BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY COMMENTS OF CBEYOND COMMUNICATIONS, LLC

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Cbeyond Communications, LLC ("Cbeyond")[1] hereby submits its reply comments in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

Cbeyond is a signatory to the comments and reply comments filed in this proceeding by the Association for Local Telecommunications Services ("ALTS"), and Cbeyond emphatically supports the arguments made therein. In particular, as made clear in the ALTS comments and by others in the record, the Commission can and must reach a conclusive finding of national

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1 Cbeyond is a facilities-based CLEC serving over 14,000 small and medium-sized business customers. Cbeyond's business customers range in size from 4 to 100 employees and they typically purchase 5 to 48 phone lines. The average Cbeyond customer is on the smaller end of this range, with 9 employees and 7 business lines. Cbeyond provides service in four metropolitan areas: Atlanta, Dallas-Fort Worth, Houston, and Denver. Cbeyond plans to enter a fifth market in early 2005.

2 *Unbundled Access to Network Elements; Review of the Section 251 Undbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Notice*").

impairment for stand-alone DS1 loops and DS1 transport. That outcome is crucial to the continued survival of local competition.

In these reply comments, Cbeyond discusses additional matters that are not fully addressed in the ALTS comments and reply comments with respect to the continued availability of Enhanced Extended Loops ("EELs"). In balancing the costs and benefits of unbundling, as required by the D.C. Circuit's decisions in *USTA I and II*, the Commission must recognize that the benefits of the continued availability of DS1 EELs as network elements far outweighs the purported costs. This is particularly true in areas outside the most densely populated urban centers where the small- and medium-sized customers Cbeyond serves will have no competitive alternatives if unbundled DS1 EELs are rendered unavailable by the Commission. Contrary to the incumbents' arguments, there is no basis for changing the current eligibility criteria for EELs. Such an undertaking is unnecessary in light of the D.C. Circuit's affirmation of those criteria in *USTA II*. Furthermore, if adopted, the incumbents' proposals for changing the eligibility criteria would not ensure that EELs are used to provide local exchange service (as the incumbents claim), but would instead ensure that EELs are not used to provide any competitive service at all.

II. CONTINUED NATIONWIDE AVAILABILITY OF EELS FREE OF UNNECESSARY AND ONEROUS USE RESTRICTIONS AND AUDIT REQUIREMENTS IS NECESSARY TO ENSURE THAT THE BENEFITS OF COMPETITION ARE WIDESPREAD.

In its comments, ALTS explained that DS1 loops and DS1 transport must be made available on a nationwide basis to ensure the continued development of local exchange competition. Similarly, the availability of EELs is critical to fostering a more robust, competitive facilities-based local exchange market. Access to DS1 EELs has enabled carriers like Cbeyond to reach small business customers located outside of core metro areas that otherwise may not have had a facilities-based competitive alternative.

In the markets in which Cbeyond provides service, it initially establishes collocations in the heart of the city. To meet customer demand outside the dense downtown areas, Cbeyond initially relies on EELs to expand its footprint in an economically rationale manner. In some markets, Cbeyond has used EELS to extend its footprint over a 100 mile diameter or, said differently, 50 miles from the downtown centers, enabling it to provide competitive local exchange service to over 100 smaller cities and towns that would otherwise have not benefited from competitive entry. Towns like Cartersville, Georgia, Aldine and Waxahachie Texas, and Fort Collins, Colorado all have access to Cbeyond's competitive local exchange service because Cbeyond has had access to EELs since it initiated service. *See* Attachment. Although ILECs suggest (with no supporting evidence) that there has been misuse of EELs, the fact of the matter is that CLECs like Cbeyond have used EELs in the way envisioned – as a means of providing competitive alternatives to customers in wire centers that do not have a volume of demand that is large enough to justify an investment in collocations.

The Commission clearly understands the importance of EELs in addressing this specific type of impairment and in promoting the broad availability of competition more generally. In the *Triennial Review Order*,[3] it concluded that,

> [t]he availability of EELs extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the competitive LEC is already located. In this way, EELs also allow competitive LECs to reduce their collocation costs by aggregating loops at fewer collocation locations and then transporting the customer's traffic to their own switches. Moreover, we find that access to EELs also promotes self-deployment of interoffice transport facilities by competitive LECs because such carriers will eventually self-provision transport facilities to accommodate growing demand.

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[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, et al., *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

> We further agree that the availability of EELs and other UNE combinations promotes innovation because competitive LECs can provide advanced switching capabilities in conjunction with loop-transport combinations. *Triennial Review Order* ¶ 576.

Notwithstanding the importance of EELs to achieving the purposes of the 1996 Act, the ILECs have argued once again that EELs should be severely restricted or prohibited – and they have done so even though the eligibility criteria adopted in the *Triennial Review Order* were, unlike many other rules adopted in that order, upheld in *USTA II*. *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). While the record is clear that EELs must remain available as UNEs, it should be equally clear that there is no basis for revisiting the eligibility criteria that currently apply to EELs.

A. If the Commission continues to conclude that EELs should not be used in the provision of certain services (*e.g.* long distance), it should retain the current eligibility criteria.

Having found EELs to be a critical element of its framework for establishing the preconditions for local competition in the *Triennial Review Order*, the Commission accepted LEC concerns that EELs could be used as a means of arbitraging special access prices. Although the Commission disallowed such use, it went a step further and adopted additional safeguards to protect incumbent LECs from potential "gaming." *See Triennial Review Order* ¶ 591. It established three categories of "architectural" criteria that a CLEC must satisfy in order to obtain high-capacity EELs. *Id.* ¶ 597. In doing so, the Commission concluded "that overly intrusive and onerous compliance requirements, such as monitoring traffic over individual circuits, serve as a drag on competitive entry." *Id.* ¶ 596.

As the court explained in *USTA II*, "both the CLECs and the ILECs object[ed] to the FCC's eligibility criteria. … The ILECs claim[ed] they are too lax and are under-inclusive insofar as they fail to prevent CLECs from using unbundled EELs exclusively for long distance

service." *USTA II,* 359 F.3d at 592-93. The court, however, rejected the ILEC (and CLEC) claims, concluding instead that,

> the Commission's eligibility criteria, though imperfect, reflect a reasonable effort to establish an administrable system that balances two legitimate but conflicting goals: the prevention of "gaming" by CLECs seeking to offer services for which they are not impaired, and the preservation of unbundled access for CLECs seeking to offer services for which they are impaired. *USTA II*, 359 F.3d at 592.

In light of this result, there is no reason for the Commission to revisit the EEL eligibility criteria. As the *Notice* declares, the purpose of this proceeding is to adopt rules that identify "which specific network elements the Commission should require incumbent LECs to make available as UNEs … *consistent with USTA II*." *Notice* at ¶ 11 (emphasis added).

Apparently in denial about the Commission's success before the court on this matter, the incumbent LECs have asked the Commission to once again revisit the criteria for obtaining EELs – and they have raised the exact same arguments that the court rejected in *USTA II.* SBC goes so far as to argue that the court "expressly invited the Commission" to revisit its previous decision, evidently suggesting that the court may have been sending the Commission a secret signal by asserting that the current rules are "imperfect."[4] In other words, SBC would have the Commission believe that a court, which clearly felt no need to restrain itself on many other matters, disagreed with the Commission's conclusions regarding eligibility criteria, but was unwilling to do anything about it. But this is absurd. Nothing in the holding is an implied, let alone "express," invitation to revisit the EELs criteria.

Moreover, the incumbents have not offered any other reason to think that it is either necessary or appropriate to revisit the EELs criteria. In arguments that are identical to ones raised before the court and previously before the Commission, the ILECs contend that the

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[4] SBC Comments at 95.

criteria are a necessary, but insufficient, condition for ensuring that EELs are used to provide local service. As Verizon complains, "the criteria … focus not on whether a particular facility is in fact used for local service, but rather on whether it could in theory be used for that purpose."[5] SBC contends that "[n]othing in the Commission's new requirements adequately protects against [an] unlawful result."[6] In other words, according to the incumbents, the criteria are insufficient because they do not provide a theoretical 100 percent guarantee that EELs will be deployed in a manner consistent with the rules.

Among its other flaws, the incumbents' argument is based on an inappropriate standard. Theoretical failure to guarantee 100 percent compliance with the intended purpose of the rules is not a basis to jettison the existing criteria. Perfection is not the standard, and the D.C. Circuit recognized this fact by pointing out "the inevitability of *some* over- and under-inclusiveness in the Commission's unbundling rules." *USTA II*, 359 F.3d at 570 (emphasis in original).

Presumably, if in fact the criteria were not achieving their purpose, the ILECs would have offered evidence to demonstrate that EELs are being systematically deployed in an improper fashion. They make no such demonstration. ILEC requests to change the eligibility criteria adopted in the *Triennial Review Order*, and upheld by the court, are a classic example of a solution in search of a problem. As the court has previously cautioned the Commission, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly

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5 Verizon Comments at 79 (emphasis omitted).

6 SBC Comments at 96; *see* BellSouth Comments at 57 ("EELs obtained at TELRIC rates ostensibly to provide local wireline service *could* be used to provide service in markets where competition thrives and where there is no impairment, such as the wireless, and long distance markets.") (emphasis added).

capricious if that problem does not exist." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). In this instance there is simply no evidence that a problem exists.

Furthermore, the incumbents' plea to impose onerous compliance burdens on CLECs turns on its head the basic principle of administrative (and judicial) law that presumes parties are in compliance with the relevant rules until they are found to be otherwise. ILECs are already getting more protection than they need through the criteria. If the FCC determines that EELs should not be used for a certain type of service, *e.g.* long distance, then a carrier violating such a restriction could be subject to the Commission's enforcement authority under section 208 of the Communications Act.[7] Accordingly, the existing criteria are unnecessary, but have been offered to ILECs as a further tool to help ensure compliance.

Finally, the incumbents' requests to impose more onerous EEL criteria fail the cost-benefit analysis under *USTA I* and *USTA II* for two additional reasons. First, DS1 and DS3 EELs utilize legacy technology. Unbundling those facilities imposes few "costs" in terms of foregone investment and innovation. Second, the existing criteria are straightforward and relatively easy to administer. Many of the incumbents' proposals for changing the EEL criteria would make them much more complex. Such changes would therefore increase the costs of administrating the unbundling system. At the same time, the benefits of keeping DS1 and DS3 EELs available for competition under the existing rules are obvious and substantial.

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[7] *See* Nuvox Comments at 24 ("If the Commission adopts rules that UNEs are not to be used for the provision of certain services, violation of the rule would justify the filing of a 208 complaint, just as any other violation of the Commission's rules. … Eligibility criteria have created confusion and imposed unnecessary burdens on the industry. They should be eliminated. If an ILEC has a good faith basis to believe a carrier is violating a Commission rule by using UNEs from services for which the Commission has determined no impairment, the carrier may file a complaint with the Commission and seek appropriate damages.").

With a court victory in hand, and the failure of the ILECs to offer anything new in support of their tired plea for more restrictive eligibility criteria, the Commission should decline the incumbents' invitation to revisit the EELs criteria.

B. There is no basis for returning to the eligibility criteria that the Commission adopted in the *Supplemental Clarification Order* and replaced in the *Triennial Review Order*.

Notwithstanding BellSouth's argument to the contrary, there is clearly no basis for returning to the disastrously flawed eligibility criteria that the Commission adopted in the *Supplemental Clarification Order*.[8] BellSouth argues that the Commission "must deny access to EELs to wireless carriers, long distance providers, and special access providers" and suggests that "restoring the safeguards established in the *Supplemental Order Clarification*" is the only way to do it.[9] This argument completely overlooks the fact that, as discussed, the court upheld the architectural safeguards and that the court found them to be a valid way to achieve the exact same result BellSouth seeks, namely, restricting access to EELs by wireless carriers, long distance providers, and special access providers. Like its fellow incumbents, BellSouth makes no effort to explain how the current criteria are in fact not meeting their stated purpose.

Moreover, the criteria established in the *Supplemental Clarification Order* resulted in many more false negatives (denying competitors access to UNEs in cases where they are impaired) than false positives (permitting competitors access to UNEs in cases where they are unimpaired) because, in many situations, they essentially prevented *any* competitor from obtaining EELs for *any* purpose. Indeed, the Commission has already concluded that "overly

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[8] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 9587 (2000).

[9] BellSouth Comments at 68, 61.

intrusive and onerous compliance requirements, such as monitoring traffic over individual circuits, serve as a drag on competitive entry." *Triennial Review Order* ¶ 596.

A reversion to the onerous compliance requirements that BellSouth seeks would merely be an invitation to harm competitive entry – in a manner the Commission has already rejected. The Commission reached several notable conclusions in the *Triennial Review Order* in support of its decision to eliminate the requirements adopted in the *Supplemental Clarification Order*. These conclusions remain true today. Specifically,

- noting CLEC concerns, "the safe harbors and auditing procedures [from the *Supplemental Clarification Order*] have proved to be unworkable and susceptible to abuse by the incumbent LECs." *Id.* ¶ 596;
- "requiring competitors to ascertain and certify to traffic percentages is burdensome and difficult to administer." *Id.* ¶ 614;
- "due to the measuring difficulties and potential for burdensome audits inherent to traffic thresholds, we conclude the usage restrictions are inferior to those [adopted in the *Triennial Review Order*]." *Id.*;
- the eligibility criteria adopted in the *Triennial Review Order* "provide an easily implemented and reasonable bright-line rule to guide the industry." *Id.* ¶ 600;
- "the criteria [adopted in the *Triennial Review Order*] … are collectively sufficient to restrict the availability of these UNE combinations to legitimate providers of local voice service." *Id.*;
- "The cost of taking the steps necessary to meet these criteria … outweighs the benefits of lowering that carriers' special access rate to a UNE rate. Accordingly, the burdens and inefficiencies for a provider to meet these criteria for non-qualifying service would deter a carrier of non-qualifying services from re-designing its operations to subvert our rules." *Id*.

To be sure, these conclusions were reached as part of the Commission decision to restrict the use of EELs (and in fact UNEs more generally) to provide "qualifying services," a construct that the D.C. Circuit overturned on appeal as inconsistent with the language of the Act. But the "qualifying services" are merely the services for which the Commission has consistently sought

to ensure the availability of EELs as an input (local, access and broadband). *See Triennial Review Order* ¶ 135. The elimination of the flawed concept of qualifying services therefore need not change the relevant analysis (assuming for purposes of this discussion *only* that eligibility criteria are necessary). Nothing in BellSouth's arguments, or in the arguments raised by other ILECs, provides a basis for reconsidering these prior conclusions. Accordingly, the Commission should deny BellSouth's request to revert back to the criteria established in the *Supplemental Clarification Order*.

C. The Commission should not change the ratio of DS1 EELs to DS1 interconnection trunks.

Under the existing eligibility criteria, carriers must maintain one DS1 interconnection trunk for every 24 DS1 EELs. In adopting this requirement, the Commission reasoned that "this ratio … provides a reasonable proxy for the capacity of interconnection that a bona fide provider of local voice service competing against the incumbent LEC would require." *Id*. ¶ 608. SBC now argues that the ratio should be reduced to 5-to-1 "to ensure that a meaningful amount of traffic that traverses the EEL is destined for an interconnection trunk."[10] However, the proposed change to the ratio would not ensure that EEL are used to carry a "meaningful" amount of local voice traffic. In many cases, the SBC proposal would ensure that *no traffic at all* traverses EELs, because the proposal would render EELs unusable to serve most customers. In fact, it would appear that the only situations in which EELs could be used efficiently under the SBC proposal would be where a CLEC could serve a narrowly defined set of customers that demand *only* voice service in relatively large volumes. Neither the Commission nor the D.C. Circuit has ever even hinted that EELs must be used *exclusively* for local voice traffic.

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[10] SBC Comments at 97.

In fact, in the *Triennial Review Order*, the Commission reached the opposite conclusion. It concluded that restricting the use of EELs solely to local voice traffic would be "antithetical the Act's goals of encouraging the provision of new technologies and advanced services." *Id.* ¶ 613. Essentially, the SBC proposal requires that each CLEC purchase interconnection trunks needed to serve 24 voice grade equivalents ("VGEs") for each DS1 EEL. As the FCC has noted, sound engineering principles establish a 5-to-1 ratio of end user connections-to-interconnection trunk capacity for voice traffic. *See Triennial Review Order* ¶ 608 (noting that under "general engineering principle[s] … one DS1 local service interconnection trunk can serve 24 DS1 EELs that have five local voice channels on each EEL."). If a CLEC is to employ an efficient interconnection-to-end user connection architecture, SBC's proposal assumes that all customers served by DS1 EELs both utilize the entire capacity on such connections and use the capacity exclusively for voice services. The assumptions underlying SBC's proposal are unreasonable for two reasons. First, Cbeyond typically sells DS1 loops that are only partially filled (usually utilizing less than half of the circuit's capacity). Accordingly, even if the average Cbeyond customer were to use all of the capacity provided to it for voice service, Cbeyond would be forced to purchase unnecessary interconnection trunk facilities. This would only serve to raise its costs and, in many cases, would render EELs simply unusable even for customers that demand only voice service.[11]

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[11] Even if Cbeyond were required to purchase additional interconnection trunks, the ILECs could attempt to refuse to install them by gaming their own self-established "underutilization" rules. ILECs often require up to 85% utilization levels before allocating additional interconnection trunks, and they often insist on eliminating trunks that do not meet these thresholds. SBC's proposal, therefore, not only requires CLECs to implement an inefficient interconnection arrangement, it also makes it virtually impossible to meet the traffic levels that would satisfy their own self-imposed requirements for interconnection trunk utilization.

Second, the reality is that virtually no small or medium-sized business customer demands only voice service. The very efficiency of the IP-based products Cbeyond provides over DS1 circuits is the ability to provision both voice and data services in a manner that takes full advantage of the power of convergence. As Cbeyond's product offerings illustrate, it is no longer necessary for minutes of use to move across the network on a reserved and discrete portion of the spectrum and no longer is channelization of a DS1 required to provide voice and data over the same circuit. The Act provided the opportunity for facilities-based CLECs to innovate and to create greater network efficiencies in order to compete more effectively and to bring greater value to customers. This has resulted in Cbeyond's services being delivered utilizing dynamic bandwidth allocation of IP service (instead of channelization) and the processing of all services, including voice, as packets instead of Time Division Multiplexed ("TDM") channels reserved for only one type of service.[12] For example, traditional circuit-switched voice providers use channelized DS1 technology and typically use one channel or a fixed 64kb of bandwidth per voice call. Each of these TDM channels arranged for voice is limited to voice only. By contrast, through the use of signaling and payload compression, Cbeyond is increasingly able to reduce its bandwidth requirements for a voice call from the approximately 80kb required to around 15kb. Capacity not being used for such voice calls is available for other applications, including data. Accordingly, advances in voice compression technology for IP circuits have made it especially inappropriate for the Commission to increase the number of interconnection capacity needed for a DS1 EEL. The changes recommended by

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[12] The underlying network architecture of Cbeyond's network is progressive and different. However, to the end user and the ILEC, the difference is transparent. When a customer places a local call or Cbeyond exchanges local traffic with an ILEC, the call and exchange is no different from a circuit-switched call. The efficiencies and differences are internal to the Cbeyond network.

SBC would merely impose unnecessary costs on competitors and would prevent them from using DS1 circuits efficiently.

D. The FCC should not add additional restrictions to the use of EELs.

Verizon contends that carriers should be prohibited from using EELs for "packet-switched broadband services" because "there is intense competition that has emerged without competing carriers relying on individual high-capacity UNEs or EELs."[13] There is simply no basis for this proposal, especially if it is intended to preclude the use of EELs for IP-based services.

Consumers have access to competitively priced IP-based services precisely because CLECs have had access to UNEs, especially UNE EELs. As the Commission explained, "[c]lassifying and measuring voice traffic separately from data traffic is incompatible with the integration of voice and data in new packetized networks … basing … new rules on the distinction between voice and data would inhibit this new technology." *Triennial Review Order* ¶ 613. Furthermore, the Commission explained that restrictions should not be adopted that "would penalize technological advancements in voice compression, and have the perverse effect of disqualifying the most efficient and innovative deployment of voice technology." *Triennial Review Order* ¶ 613. Verizon's proposal is a step backward, with the intended purpose of discouraging efficient packet-based technologies.

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[13] Verizon Comments at 78.

III. CONCLUSION

For the foregoing reasons, Cbeyond respectfully requests the FCC not alter the current eligibility criteria for the provisioning of EELs and otherwise adopt unbundling rules consistent with these reply comments.

Respectfully submitted,

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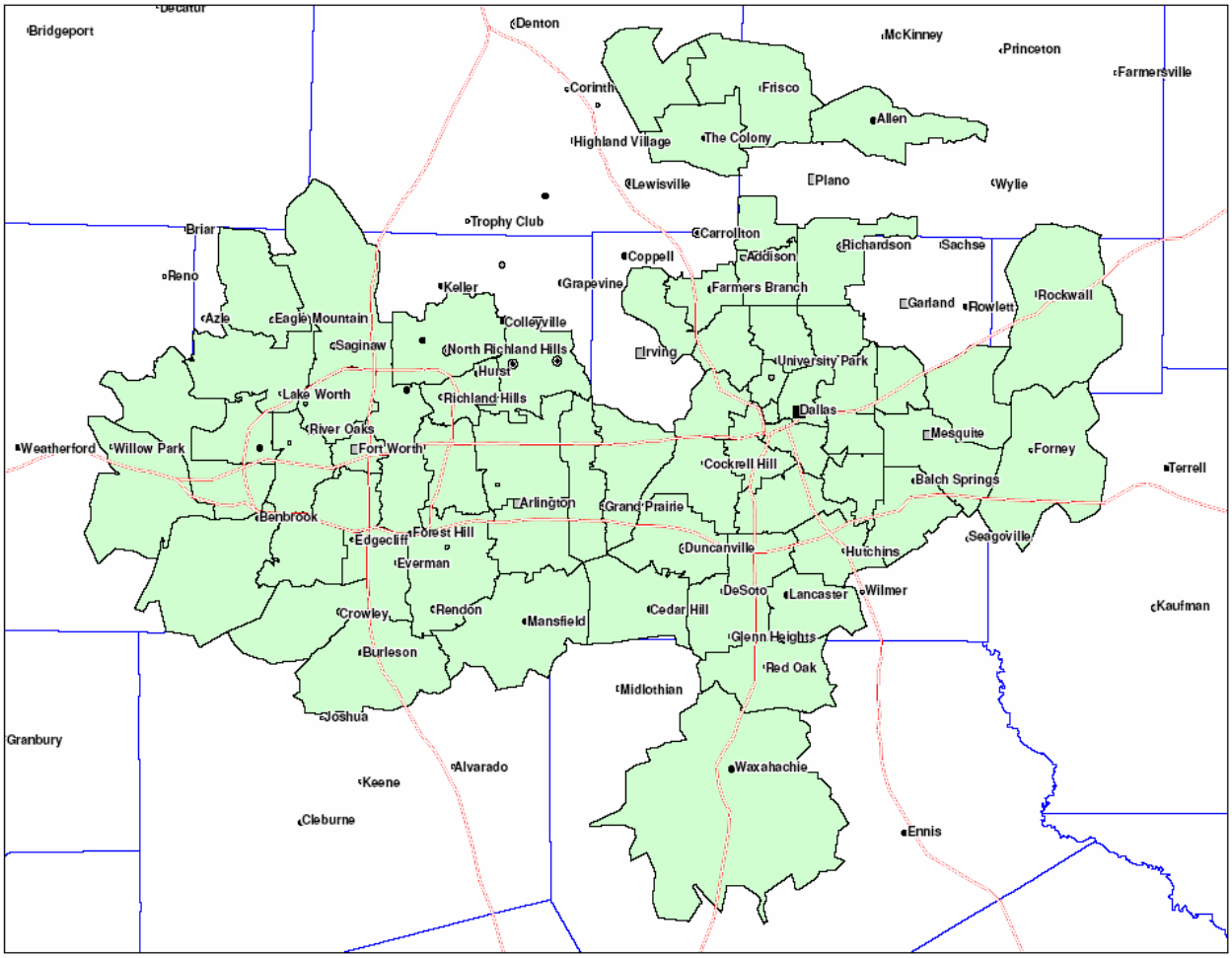
ATTACHMENT

Cbeyond's Current Service Territory In And Around Atlanta, GA

Cbeyond Reply Comments,
Docket Nos. 04-313, 01-338
October 19, 2004

Cbeyond's Current Service Territory In And Around Dallas & Forth Worth, TX



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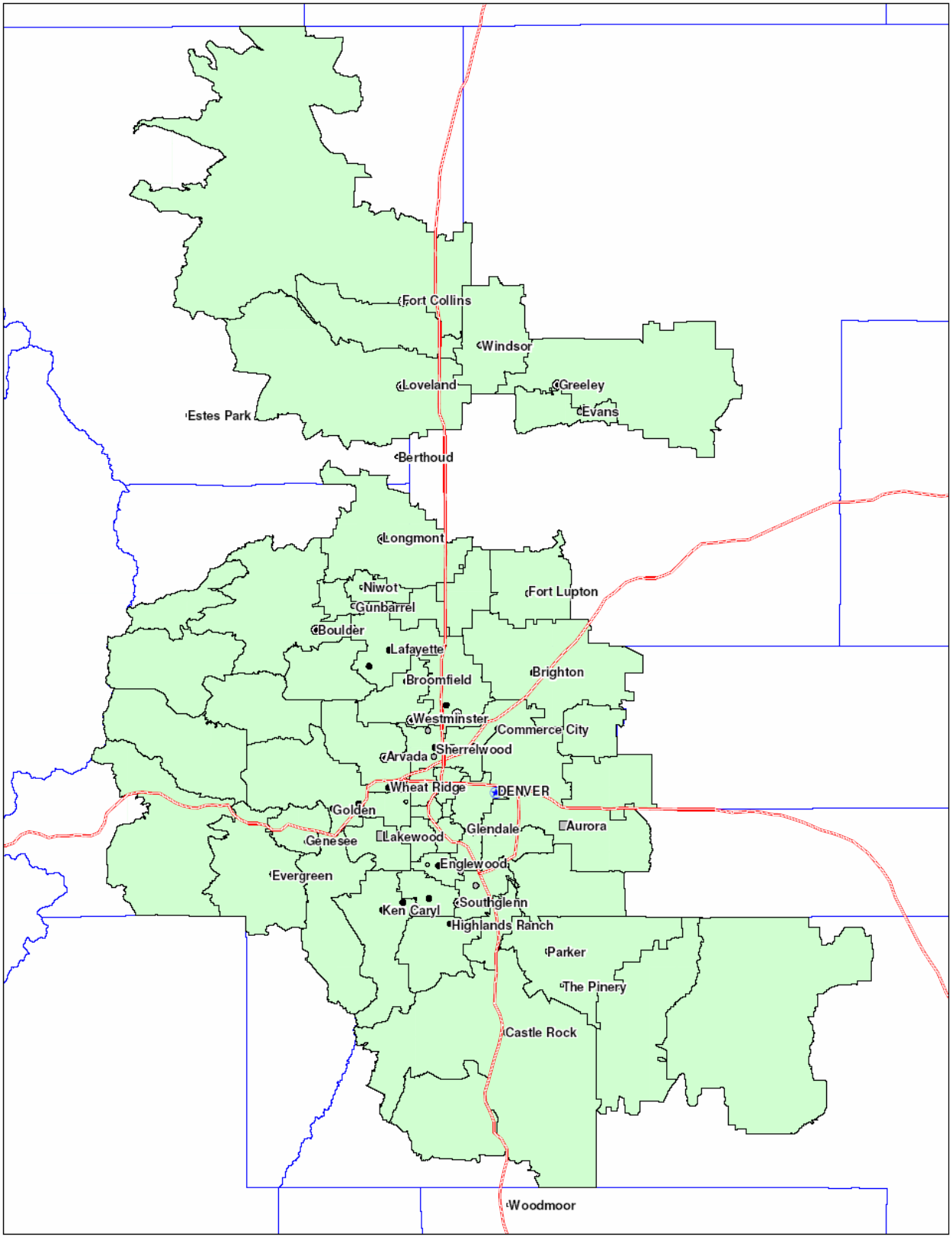
Cbeyond's Current Service Territory In And Around Denver, CO



Cbeyond Reply Comments,
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Cbeyond's Current Service Territory In And Around Houston, TX

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